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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Beehive Telephone Company, Inc.	)	CC Docket No. 97-237
Beehive Telephone, Inc. Nevada	)	
	)	Transmittal No. 6
Tariff F.C.C. No. 1	)	

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OPPOSITION TO PETITION FOR RECONSIDERATION

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SUMMARY

In its order concluding the investigation Of Beehive's access rates, the Commission found that Beehive had not provided an adequate explanation for the "sharp increases" in operating costs and demand that it claimed justified the increase to the local switching rate. It also confirmed that Beehive had used an unlawful rate of return to calculate the switching rate. Because Beehive failed to meet its burden under the Communications Act to demonstrate that its local switching rate was just and reasonable after a full investigation, the Commission prescribed a reasonable rate and ordered a refund of the difference between the proposed rate and the prescribed rate.

Beehive claims in its petition for reconsideration that it had inadequate time to present its direct case and was denied a full opportunity for hearing, that the Commission should not have relied on industry average cost data to set a rate in spite of Beehive's refusal to provide the information the Commission mandated, and that the Commission should now accept additional cost and demand information to support Beehive's rate revisions.

Contrary to Beehive's arguments, it clearly had a full opportunity to present its direct case. When it failed to do so, the Commission reasonably and lawfully relied on industry average cost data to set a rate. Moreover, the data Beehive now presents to supports its

rate is inaccurate and unsupported. Accordingly, Beehive has not met the requirements of Section 1.106(c) because it has failed to present any facts that have changed since its opportunity to present its direct case, or which it could not have known at that time, and its petition should be denied.

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OPPOSITION TO PETITION FOR RECONSIDERATION

Pursuant to Section 1.106(g) of the Commission's Rules, 47 C.F.R. Sec. 1.106(g), AT&T Corp. ("AT&T") hereby opposes the petition for reconsideration filed by Beehive Telephone Company, Inc. and Beehive Telephone, Inc. Nevada (collectively, "Beehive").

BACKGROUND

On July 22, 1997, Beehive proposed to increase its premium local switching rate to $.04012 per minute from $.03480 per minute, and to decrease its premium local transport facility and termination rates, assertedly resulting in an overall decrease in access rates.

AT&T filed a petition to reject or suspend and investigate the revisions, showing that Beehive's access rates have been grossly excessive since it withdrew from the NECA pool and began filing its own access tariff in 1994, at the same time that it entered into an arrangement with a chat line provider, Joy Enterprises, Inc. ("JEI"), to share a portion of its access revenues in return for the provider undertaking to stimulate long distance calling to Beehive's exchanges. AT&T demonstrated that,

given Beehive's excessive rate levels since the inception of the chat line, its proposed rate reduction was clearly warranted but that the accompanying rate reductions and increase to the local switching rate were in all probability insufficient to retarget its earnings on a re-price basis to the Commission's prescribed rate of return, because Beehive's tariff filing was affected by the same incentives to manipulate costs and demand that were responsible for Beehive's previously inflated rates. Beehive's response to AT&T's petition claimed that its proposed increase to its switching rate was "fully justified" by increases in its interstate usage and expense levels.[1]

On August 5, 1997, the Common Carrier Bureau suspended Transmittal No. 6 for one day and initiated an investigation into whether Beehive's traffic sensitive local switching rate was lawful under the Communications Act and justified under existing rules governing interstate access charges.[2] On December 2, 1997, the Bureau designated one issue for investigation -- whether Beehive's local switching rate was based on its interstate demand and related cost of service (as indeed Beehive

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1 Beehive Reply to Petition to Suspend and Investigate, filed Aug. 4, 1997, at 7.

2 Beehive Telephone Company, Inc., Beehive Telephone, Inc. Nevada, Tariff F.C.C. No. 1, Trans. No. 6, Suspension Order, DA 97-1674 (rel. Aug. 5, 1997) ("Suspension Order").

itself had claimed). The Bureau directed Beehive to provide in its direct case investment, expense and revenue information and an explanation supporting its calculation of demand.[3]

Considering Beehive's prior representation that the local switching increase was "fully justified" in its reply to AT&T's petition to reject its revisions, Beehive should have been readily able to promptly provide the cost support mandated by the Bureau. Instead, Beehive requested an extension of time to file its direct case, which the Bureau granted in part, giving Beehive an extra three calendar days to file its case. After that submission was filed, Beehive filed a "supplement" to its direct case, which claimed to depict its July 1, 1997 revenue requirement based on combined 1995 and 1996 actual costs and a chart depicting dial equipment minutes ("DEMs").

Beehive's direct case and supplement provided only summary information, with no back up data. As AT&T pointed out in its opposition to the direct case, after numerous opportunities to submit the appropriate data, Beehive had still ignored the Commission's specific directive to "provide an explanation supporting its

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[3] Beehive Telephone Company, Inc., Beehive Telephone, Inc. Nevada, Tariff F.C.C. No. 1, Trans. No. 6, Order Designating Issues for Investigation, DA 97-2537 (rel. Dec. 2, 1997), at paras. 7-8 ("Designation Order").

calculation of demand and the DEM allocator," and an "explanation and data supporting any changes in costs and demand from year to year." Its filing also showed that its rates had produced grossly excessive rates-of-return of 111 percent and 65 percent for 1995 and 1996, respectively.[4]

In its order concluding the investigation, released on January 6, 1998, the Commission found that Beehive had not provided an adequate explanation for the "sharp increases" in operating costs and demand that it claimed justified the increase to the local switching rate. It also confirmed that Beehive had used an unlawful rate of return to calculate the switching rate.[5] Because Beehive failed to meet its burden under the Communications Act to demonstrate that its local switching rate was just and reasonable after a full investigation, the Commission prescribed a rate of $.009443 per minute of use for premium local switching, based on the average total operating expense to total plant in service (TPIS) ratio for local exchange carriers ("LECs") with between 800 and 1000 lines in the NECA pool. Although the average total operating expense to TPIS for the 55 companies in the NECA

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[4] AT&T Opposition (filed Dec. 22, 1997) at 4-5.

[5] Beehive Telephone Company, Inc., Beehive Telephone, Inc. Nevada, Tariff F.C.C. No. 1, Trans. No. 6, Memorandum Opinion and Order, FCC 98-1 (rel. Jan. 6, 1998), at para. 14. ("Prescription Order").

sample was 21.55 percent, Beehive reported a ratio of operating expense to TPIS of only 23.55 percent in 1994 and 24.03 percent in 1995. The Commission used a ratio of 25 percent to produce a reasonable estimate of Beehive's operating expenses, which is higher than three-quarters of the LECs in the NECA sample. This percentage allowed for the possibility that Beehive has higher-than-average operating expenses, even though Beehive had not demonstrated that in its direct case.[6]

The Commission used a total DEM of 59,484,566 minutes, as reported by Beehive in its direct case, and a rate of return of 11.25 percent to prescribe the premium local switching rate, and ordered a refund of the difference between Beehive's proposed rate and the prescribed rate.[7]

Beehive now claims in its petition for reconsideration that it had inadequate time to present its direct case and was denied a full opportunity for hearing. Petition at 2-9. Beehive then argues that the Commission is required now to accept, over 60 days after the filing of its direct case, additional cost and demand information which the Commission did not previously consider. Id. at 12. It also argues that the Commission cannot rely on the staff's use of an average total operating expense to TPIS

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[6] Id. at paras. 17-22.

[7] Id. at paras. 22-26.

ratio to calculate the rate because Beehive's access line density is lower than that of other small LECs, and its operating expense to TPIS ratio is unusually high because it uses leased switching equipment at four of its exchanges, which it claims increases its operating expenses. Id. at 13-17.

Beehive also claims that the Commission improperly relied on the total interstate DEMs Beehive reported in its direct case to calculate demand. It insists that the Commission should have used Beehive's 1995/96 access minutes, as first reported in its rebuttal case, to calculate demand. Id. at 18. Finally, it argues that the Commission should have considered its increase in corporate expenses attributable to "extraordinary litigation costs and increased administrative expenses" associated with its efforts to stimulate traffic through the use of the chat line, JEI. Id. at 19-21.

In addition to being a transparent attempt to once again supplement its defective direct case, all of Beehive's arguments are baseless and should be rejected. Contrary to the requirements of Section 1.106(c), Beehive has failed to present any facts that have changed since its opportunity to present its direct case, or which it could not have known at that time. Moreover, even if the Commission were to consider Beehive's new data (which it should not) that newly provided information is inaccurate and unsupported, and does not in all events justify the

increase it sought for local switching. Accordingly, Beehive's petition for reconsideration should be denied.

ARGUMENT

Beehive Was Given Adequate Notice And A Full Opportunity To Present Its Direct Case.

Beehive argues that the Bureau's practice in tariff investigations is to give carriers at least 30 days to prepare a direct case, and that the 15 day filing period it had in which to file its direct case was not adequate to address the sole issue the Commission designated.[8] The "practice" that Beehive relies on is demonstrably non-existent; it is well established that the Commission has discretion to conduct rate investigations in any manner that it deems efficient. In fact, after the passage of the Telecommunications Act of 1996, the Commission affirmatively rejected the establishment of

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[8] Notably, Beehive does not indicate in its petition what it would have done differently if it would have had 30 days or more to respond to the Commission's request for data. In addition, it complains that it did not have proper notice of the filing period because the dates in the Designation Order were internally inconsistent in the text of the Order. In the Order granting a partial motion of extension of time for Beehive, the Bureau found that the correct filing data was on page one of the Order, that it was unreasonable for Beehive to have assumed that its case was due on December 18, and that it failed to present any evidence that it relied on the later date. Order, DA 97-2597 (rel. Dec. 12, 1997) at para. 3. Beehive presents no new facts in its petition for reconsideration to demonstrate that it relied on the December 18 date, and its argument on this point should be denied.

specific rules for expediting tariff investigations, including a proposal to give carriers 21 days after a designation order to file a direct case. The Commission stated,

> We agree with the commenters that oppose establishment of specific rules for expediting tariff investigations at this time. Rather, we will continue to set out procedures for designation orders that best meet the needs of a particular proceeding. We have the discretion, for example, to set page limits, establish pleading cycles, or use pro forma designation orders. We find that retaining flexibility is the best means of ensuring that tariff investigations are completed within the five month limit.[9]

Accordingly, the Commission does not have a rule, policy or practice establishing a standard length of time granted to carriers subject to tariff investigations under Section 204(a) to file their direct cases, and Beehive's argument that it had inadequate time to prepare its direct case is baseless. In fact, the Tariff Requirements Order put Beehive on notice that it might have less than 21 days to prepare and file a direct case justifying its proposed switching rate.

The Commission's Use Of Industry Average Cost Data Was Reasonable And Lawful.

Beehive also argues that it did not have an adequate opportunity to comment on the Bureau's decision

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[9] Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, 12 FCC Rcd 2170, 2221-22 (rel. Jan. 20, 1997) ("Tariff Requirements Order") (emphasis supplied).

to base the rate prescription on average industry costs and that its due process rights were violated by the Commission "concocting its new 'average ratio of operating expenses to gross investment' methodology." Petition at 11. This argument also fails. As the Commission has found previously, "Section 204(a) states that carriers, not this Commission, have the burden of proving that their rates are just and reasonable," and where the carrier has not met this burden, the Commission has full and complete authority to rely on industry average costs in setting rates.[10]

The Designation Order required Beehive to provide "detailed costs for 1994 through 1996 and an explanation and data supporting any changes in costs and demand from year to year" (emphasis added).[11] Notwithstanding this clear and explicit requirement, Beehive failed to explain the reasons for the increase in its operating expenses or to explain the methodology it

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[10] Local Exchange Carrier Rates, Terms and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport, CC Docket No. 93-162, Second Report and Order (rel. June 9. 1997), at para. 405 ("LEC Collocation Rate Order")(rejecting argument that the LECs, which violated a specific directive to file individual overhead loading factors, were denied a full opportunity for hearing when the Commission used industry average data to supplement the data the LECs failed to provide). See also In the Matter of 1997 Annual Access Tariff Filings, CC Docket No. 97-149, FCC 97-403 (rel. Dec. 1, 1997) at para. 148..

[11] Designation Order at para. 7.

used to calculate its reported increases in plant specific expenses, even though such information was presumably readily available.[12] The Commission therefore found that,

> Given Beehive's failure to justify or support its proposed increase in operating expenses and its use of an unauthorized rate of return in calculating interstate local switching rates contained in Transmittal No. 6, we find that Beehive's rates subject to this investigation are unjust and unreasonable.[13]

Accordingly, in the absence of any other information from Beehive the Commission was required to prescribe a reasonable switching rate based on industry average information. To support its prescription, the Commission reasonably relied on operating expense data for companies similar in size to Beehive. In fact, the Commission gave Beehive the benefit of being a higher than average cost company by allowing a 25 percent operating expense to TPIS ratio, which is more than that reported by Beehive for the calendar years 1994 and 1995, rather than

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[12] Beehive originally claimed that it operating expenses were a result of the cost of fiber optic cable. See Prescription Order at para. 14. It reported that it had "600 miles of fiber and microwave" in its rebuttal case (p. 6), and reports in its petition that it has "1,180 route miles of cable." Its rebuttal stated that the fiber was spread across 12 exchanges (p. 5) and reports in its petition that the fiber is spread across 14 exchanges (p. 16). Even apart from these discrepancies in basic facts, Beehive has still failed to quantify the cost of the cable or explain the basis for the alleged expense.

[13] Prescription Order at para. 16. Contrary to Beehive's conclusory statement in its petition (p.22), it has not shown that it calculated its local switching rates based on a lawful rate-of-return.

using the 21.55 percent which the Commission calculated for similar companies. The Commission has relied on similar industry average data in other investigations in which the carriers failed to file specific data supporting their rates,[14] and therefore did not resort to a "concocted" methodology to prescribe the Beehive rate.

Beehive's Supplementary Data Is Inaccurate And Unsupported.

Even if the Commission were required to consider the information Beehive now presents to explain the basis for its operating expenses, which it is not,[15] Beehive's new information is inaccurate and unsupported.[16] Beehive argues that it leases switching equipment at four of its exchanges at a cost of $28,000 per month, which it books as an operating expense. This lease expense, it claims, supports a high operating expense to TPIS ratio, and therefore justifies a high switching rate. Petition at 17-18.

Once again, Beehive has failed to explain its methodology for calculating this expense. Using Beehive's figure of $28,000 per month, it is apparently paying

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[14] See, e.g., LEC Collocation Rate Order at para. 146; Prescription Order at para. 21.

[15] See Prescription Order at para. 14.

[16] The Commission has held that reconsideration based on supposedly new facts is only appropriate if such facts were unknown to the petitioner at the time that it submitted its case. See Creation of an Additional Private Radio Service, 1 FCC Rcd 5, 6 (1986).

$7,000 per month to lease a switch for a few subscribers. Moreover, Beehive states that its costs for leasing switching equipment in 1996 were $672,000. Petition at 19. If its monthly expense is $28,000 (Petition at 17), its annual cost should be $336,000. Beehive has failed to explain this apparent serious discrepancy with purported lease expenses. In addition, using the annual figure of $672,000, Beehive's leased costs for four switches is 54.73 percent of plant specific expenses (i.e., $672,000 divided by $1,227,761),[17] while the costs for its other eight switches[18] would only account for 45.27 percent of plant specific expenses. Beehive also has not explained this anomaly in the data.

Beehive has also not shown that any of these reported costs for leased switching equipment are reasonable. Beehive admittedly leased the equipment in 1995 in order to meet the increased usage generated by its arrangement with JEI. Petition at 19. It also claims that its corporate operations expenses, including litigation and administrative expenses, increased in each calendar year because of its arrangement with JEI. Petition at 19. As AT&T has shown in its pending formal

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[17] In its Petition Beehive reported $1,227,761 in plant specific expenses for 1996. Petition at 19.

[18] Beehive reported in its rebuttal case (p. 5-6) that it operates 12 digital switches in 12 exchanges.

complaint,[19] costs or expenses associated with JEI may not be lawfully recovered through access charges to carriers, because Beehive shares its regulated, tariffed access revenues with JEI on each call that terminates to the chat line numbers operated by JEI. Beehive attempts to equate the payments it remits to JEI with commissions carriers pay to aggregators in return for the aggregators presubscribing their phones to a particular carrier. The two arrangements are not the same.[20] Moreover, Beehive is not entitled to recover the alleged expenses associated with JEI through its regulated access rates because it is not operating as a common carrier when it terminates traffic to JEI. Beehive entered into a specialized arrangement with JEI to remit its tariffed terminating access revenues to it in return for JEI stimulating usage into Beehive's exchanges. This arrangement caused Beehive to have a direct, and greater, economic interest in delivering calls to one set of destination telephone numbers in its service area than to other destination numbers. By acquiring such a subjective interest in this traffic, Beehive ceased to operate as a common carrier

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[19] AT&T v. Beehive, File No. E-97-04, filed Oct. 28, 1996.

[20] Interexchange carriers, like AT&T, traditionally pay commissions to aggregators to promote the origination of traffic on their networks. AT&T does not pay these commissions in order to promote the delivery of calls to specific telephone numbers, as Beehive has done with the JEI arrangement.

with regard to these calls, and was thus not entitled to charge tariffed terminating access charges.[21]

Finally, Beehive argues that the Commission should have used its total 1995/96 access minutes to calculate its demand instead of its total DEMs. Beehive claims that there was no discrepancy between its direct and rebuttal case on this point because it provided total DEMs in its direct case of 59,484,566 and total access minutes in its rebuttal case of 55,585,464 (reported in the Prescription Order as 55,585,565), and that the Commission should have used the access minutes to calculate demand. Petition at 18. Beehive is wrong. As the Prescription Order stated correctly, under Section 69.113 of the Commission's rules, demand is calculated by multiplying the number of non-premium interstate DEM minutes by 0.45, and adding this amount to the number of premium interstate DEMs. The Commission should reject

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[21] The Common Carrier Bureau has previously concluded that by remitting any portion of its common carrier service revenues to a destination entity, a carrier no longer acts as an objective conduit of its customers' communications without influence or control in determining the content or destination of calls. In Ronald J. Marlowe, 10 FCC Rcd 10945 (1995), app. for review pending ("Marlowe"), the Enforcement Division determined that arrangements like the one between Beehive and JEI do not constitute common carriage under the Act; accordingly, bills for the access charges that facilitate this practice would be invalid. The Bureau also found that the carrier would be engaging in an unjust and unreasonable practice under Section 201(b) of the Act, 47 U.S.C. § 201(b), by imposing tariffed charges associated with these calls.

Beehive's attempt to re-label demand numbers without sufficient back-up data, and adhere to its entirely reasonable demand calculation, based on Beehive's own reported data in its direct case.[22]

WHEREFORE, for the foregoing reasons, Beehive has failed to present facts which have changed or which it could not have known when it filed its direct case. Even if the Commission were to consider Beehive's new data, it

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[22] Even if the Commission were to re-calculate its rate prescription using Beehive's "access minutes," which it is not required to do, dividing Beehive's revenue requirement adjusted to reflect an 11.25 percent rate-of-return would produce Beehive's recalculated rates for local switching of $.010106 for premium access minutes and $.004548 for non-premium access minutes, which is still far below Beehive's proposed rates of $.04012 and $.01805, respectively.

is inaccurate and unsupported and does not justify the increase it sought for local switching, and its petition for reconsideration should be denied.

Respectfully submitted,

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February 19, 1998

CERTIFICATE OF SERVICE

I, Ann Marie Abrahamson, do hereby certify that on this 19th day of February, 1998, a copy of the foregoing "Opposition to Petition for Reconsideration" of AT&T Corp. was served by U.S. first class mail, postage prepaid, to the parties listed below.

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